June 7, 1935.

State Land Board,
State Land Department,
Phoenix, Arizona.

Gentlemen and Madam:

At the last meeting of the State Land Board, held on May 29nd, your board directed the Attorney General to render an opinion as to whether or not the State Land Board could lawfully refund money paid by two persons, namely: Archie Campbell and W. J. Burnett, upon Certificates of Purchase, which Certificates of Purchase purported to convey to the said Campbell the S½ of Section 2, Township 5 South and Range 4 East, Gila and Salt River Base and Meridian and to the said Burnett the N½ of said Section 2, Township 5 South and Range 4 East. The purchasers are requesting that the monies paid by them on said Certificates of Purchase be refunded for the reason that said Section 2 is a part of the Gila River Indian Reservation, and did not at the time of the purported sale, or any subsequent time, belong to the State of Arizona.

The purported sale, above referred to, appears to have been made and said Certificates of Purchase issued in the year of 1930.

It appears from the records of the United States Land Office that the Commissioner of Indian Affairs claims title to said Section by reason of an appropriation made thereof by use and occupancy by the Indians of the Gila River Reservation in the year of 1908. It also appears from the records of the said Land Office that by executive order said Section was withdrawn for use by the Indians on June 2, 1913.

Section 24 of the Enabling Act, provides in part, as follows:

"That in addition to sections sixteen and thirty-six heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed state not otherwise appropriated at the date of the passage of this act are hereby granted to the said State for the support of common schools.***"

It appears that the Federal Government has taken the position that the executive withdrawal order of June 2, 1913, dated back to the use and occupancy by the Indians by said Section 2, which use and occupancy dates back to the year of 1908.

It is my opinion that this position is tenable and in the end can only be adjudicated on questions of fact to establish whether or

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not the Indians actually began to use and occupy said Section 2 in the Year of 1908, as to constitute an appropriation within the meaning of the Enabling Act.

The ultimate determination as to whether or not the title to said Section 2 was vested in the State of Arizona in the year 1910, by virtue of the Enabling Act, is in my opinion immaterial in the present case. The fact remains that title in said Section 2 was in dispute at the time of said sale, and that at that time and ever since, the State has not been in a position to pass title, by patent, to Section 2 to the aforementioned purchasers.

For the reasons set forth above it is my opinion that your board may order said Certificates of Purchase cancelled on the grounds of mistake, and that you may lawfully refund the money paid thereon to the purchasers.

Section 2996 of the Revised Code of Arizona, 1928, so far as applicable to our present case, provides:

> "Any sale made by mistake, or not in accordance with law, or obtained by fraud, shall be void and the certificate of purchase issued thereon shall be void, and the holder of such certificate shall surrender the same to the commissioner, who shall, except in case of fraud, cause the money paid thereon to be refunded to the holder of such certificate.* * **

Under the provisions of Section 4 of the Enabling Act, the proceeds of such sale became vested in the permanent school funds of the State. The records of the State Land Department disclose that Campbell and Burnett paid the required 5% of the purchase price within the time prescribed by law. These amounts apparently became vested in the permanent school fund of the State, as required by the State Constitution and the Enabling Act. However, it is my opinion that these amounts may be legally refunded by your board to the purchasers, from the permanent school fund, for the reason that title to said Section 2 was in dispute at the time of the purported sale and the proceeds did not actually become co-mingled with the permanent school funds. It follows that the monies paid by said purchasers, became a trust fund, held in trust, either for (1) the permanent school fund in the event title tothe said Section 2 should be declared to be vested in the State of Arizona; or (2) For the purchaser in event that it should be determined that title to said land should be vested in the Federal Government. It being apparent that title to said Section 2 is still in dispute, it therefore follows that the purchasers can demand that their money be refunded at this time, just as rightfully as they could demand, upon payment in full of the purchase price, that patent be issued to them for said Section 2. If they chose the latter course it is my opinion the State would be unable to issue patent to the land in question, at this time.

It also appears from the records of the State Land Department that the said Campbell and Barnett paid, in full, all fees required to be paid by Section 3023 of the Revised Code of Arizona, 1928. It is my opinion that these fees must be refunded out of the general fund and not out of the permanent school fund, for the reason that the amounts paid by the purchasers, as fees, were vested in the general fund of the State Land Department, and did not become a part of the permanent school fund.

Therefore, for the reasons and authorities set forth above, it is the opinion of the Attorney General that the State Land Board can legally refund the money paid by the purchasers on these Certificates of Purchase by the two methods outlined above.

Respectfully submitted,

JOHN L. SULLIVAN,
Attorney General

Elmer C. Coker,
Assistant Attorney General.